Office - Supreme Court, U.S.
FILED
SEP 20 1982
ALEXANDER L. STEVAS,
CLERK

82-470

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

THE CITY OF LOS ANGELES,

Petitioner,

vs.

SOCIETA PER AZIONI DE NAVIGAZIONE ITALIA, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

IRA REINER,
City Attorney of Los Angeles
WINSTON F. TYLER,
Senior Assistant City Attorney
RAYMOND P. BENDER,
Assistant City Attorney
425 South Palos Verdes Street
P.O. Box 151
San Pedro, CA 90733-0151
(213) 519-3750

Attorneys for Petitioners.

The Brief Shop • Legal Printers • (213) 877-8620

QUESTIONS PRESENTED

The questions presented are:

1. Whether the "Saving to Suitors" clause of 28 U.S.C. §1333 allows a state court to impose its own liability laws to determine responsibility for vessel accidents when this law conflicts with the principles established by ***United States v. SS Van Buren***, 490 F.2d 504 (9th Cir. 1973), and when the application of state law allows liability for vessel accidents to vary from state to state and to vary even within a state depending on whether suit is filed in state or federal court.

2. Whether the California Supreme Court has misapplied the borrowed servant doctrine applicable to admiralty matters by looking to the *status* of the City as a general employer rather than the *control* exercised by the vessel master over the pilot at the time of the accident.

PARTIES IN THE COURT BELOW

Shipowner SOCIETA sued the City and City cross-complained against SOCIETA. The pilot was not a party to this action. SOCIETA and City jointly agreed to pay the damages of an innocent party, Union Oil Company, which intervened. Therefore, Union Oil Company did not participate in the trial or appeal of this matter.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES IN THE COURT BELOW	ii
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
1. Proceedings Below	3
2. Facts	4
a. The Accident	4
b. Request for Pilotage Service	5
c. Tariff Item 205	6
REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI	7
I. THE CALIFORNIA SUPREME COURT BY APPLYING STATE LAW EXCEEDED THE JURISDICTION ALLOWED TO THE STATE UNDER THE SAVING TO SUITORS CLAUSE OF 28 U.S.C. §1333(1) AND DESTROYED THE POSSIBILITY OF A UNIFORM MARITIME LAW.	7

Page

II. THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH THE FEDERAL ADMIRALTY LAW AS SET FORTH IN *UNITED STATES v. SS PRESIDENT VAN BUREN* [(9th Cir. 1973) 490 F.2d 504]. 8

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE CALIFORNIA SUPREME COURT REJECTED THE FEDERAL STANDARD APPLICABLE TO BORROWED SERVANT CASES. 10

CONCLUSION 12

APPENDIX "A"
OPINION, CALIFORNIA SUPREME COURT, 31 Cal.3d 446, 183 Cal.Rptr. 51, 645 P.2d 102, DATED MAY 24, 1982 A-1

APPENDIX "B"
ORDER DENYING REHEARING, CALIFORNIA SUPREME COURT, DATED JUNE 23, 1982 B-1

APPENDIX "C"
CONSTITUTION OF THE UNITED STATES, ART. III. §2, cl. 1;
28 U.S.C. §1257, §1333(1), 46 U.S.C. §211;
CALIFORNIA HARBOR NAVIGATION CODE, §820 C-1

Page

APPENDIX "D"
ORDER ON MOTION FOR SUMMARY ADJUDICATION OF ISSUES, SUPERIOR COURT OF CALIFORNIA, DATED APRIL 1, 1976 D-1

APPENDIX "E"
BOARD OF HARBOR COMMISSIONERS, PORT OF LOS ANGELES, TARIFF ITEMS 200 AND 205 E-1

TABLE OF AUTHORITIES

	Page
Cases	
Askew v. American Waterways Operators, Inc. 411 U.S. 325 (1973)	7
City of Long Beach v. American President Lines ("Van Buren I") 223 F.2d 853 (9th Cir. 1955)	9
City of Los Angeles v. Standard Transportation Company 32 F.2d 98 (9th Cir. 1929)	10, 11
Cox Broadcasting Corp. v. Cohn 420 U.S. 469	2
Denton v. Yazoo & M.V.R. Co. 284 U.S. 305 (1931)	10
Intagliata v. Shipowners and Merchants Towboat Co., Ltd 26 Cal.2d 365 (1945)	8
Kossick v. United Fruit Company 365 U.S. 765 (1961)	12
O'Dell v. Espinoza 102 S.Ct. 1865 (1982)	2
Standard Oil Company v. Anderson 212 U.S. 215 (1909)	10

	Page
United States v. SS President Van Buren ("Van Buren II") 490 F.2d 504 (9th Cir. 1973)	i, 1, 8-10

Statutes

28 U.S.C. §1257	3
28 U.S.C. §1257(3)	2, 3
28 U.S.C. §1331(a)	2
28 U.S.C. §1333	i, 7
28 U.S.C. §1333(1)	3, 7
28 U.S.C. §2101(c)	2
46 U.S.C. §211	2, 3, 7
California Harbor Navigation Code, §820	3

Rules

Supreme Court Rules, Rule 207	2

Constitution

United States Constitution, Art. III, §2, cl. 1	2, 3

Page

Municipal Ordinances

Los Angeles City Charter, Art. XI	5
Los Angeles Board of Harbor Commissioners:	
Tariff Item 205	5, 6
Tariff Item 205(a)	6
Tariff Item 205(b)	6
Tariff Item 205(c)	6
Tariff Item 205(e)	4-6
Tariff Item 205(f)	6

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

THE CITY OF LOS ANGELES,

Petitioner,

vs.

SOCIETA PER AZIONI DE NAVIGAZIONE ITALIA, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF CALIFORNIA

OPINION BELOW

The California Supreme Court ("Court"), applying state not federal law, struck down a City of Los Angeles Tariff Pilotage provision as contrary to the California Tort Claims Act. A comparable pilotage provision has been enforced by the Ninth Circuit in *United States v. SS Van Buren*, 490 F.2d 504 (9th Cir. 1973). The Court also held that a port pilot

supervised solely by the vessel master at the time of the accident was an employee of both the City and the vessel owner for liability purposes. The opinion is reported at 31 Cal.3d 446, copy attached as Appendix "A." In doing so, the Court reversed a California Court of Appeal decision holding that the pilot was solely an employee of the vessel. Although the Court has remanded the case to the trial court on a limited issue, the two legal principles applied by the Court and challenged here are not affected by the remand. [1/]

JURISDICTION

Petitioner was the respondent in the California Supreme Court. The Court's original opinion and judgment were entered on May 24, 1982. Petitioner requested a rehearing. The June 23, 1982 order denying rehearing is set forth in Appendix "B." This petition is timely filed within ninety days of the denial of rehearing [28 U.S.C.§2101(c)]; Supreme Court Rules, Rule 207. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), §1331(a), 46 U.S.C. §211 and Art. III, §2, cl. 1 of the United States Constitution.

1/ The City is aware of this Court's decision in ***O'Dell v. Espinoza***, 102 S.Ct. 1865 (1982) and believes the limited remand does not affect the City's right to petition for certiorari. This Petition is not premature because, as recognized in ***Cox Broadcasting Corp. v. Cohn***, 420 U.S. 469, 477, the principles decided by the California Supreme Court will survive the remand and require decision. The trial court on remand is to apportion liability for the pilot's negligence between the vessel and the City.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States, Art. III, §2, cl. 1. Appendix C.
2. 28 U.S.C. §1257, §1333(1), 46 U.S.C. §211, Appendix C.
3. California Harbor Navigation Code, §820, Appendix C.

STATEMENT OF THE CASE

1. Proceedings Below

In 1975, shipowner SOCIETA DE NAVIGAZIONE ITALIA ("SOCIETA") filed a complaint in the California Superior Court against City alleging that an accident in which its vessel DA VERRAZANO was involved was caused by the negligence of a pilot in the general employ of the City. The suit requested indemnity for any monies SOCIETA might have to pay to Union Oil Company, a damaged third party. In its answer, the City alleged that the pilot was the servant of the vessel at the time of the accident and was therefore the responsibility of the shipowner. City also contended the pilotage provisions of the City tariff, as a tariff and as a contract, required the vessel to indemnify the City for any liability it might sustain while the pilot was under the direction and control of the vessel. The City also cross-complained against SOCIETA for damages to its wharf.

The trial court granted shipowner's motion for partial summary judgment, holding that the City's Tariff Item 205(e) was void under state law. A copy of this Order is attached as Appendix "D." A copy of the Tariff Item is attached as Appendix "E." At trial, the court ruled the pilot was solely the City's employee and refused to apply the City's Tariff Pilotage provisions, considering itself bound by the earlier motion. Proceeding on a straight negligence basis, the court found that the accident was caused 25 percent by the negligence of SOCIETA's crew and 75 percent by the pilot.

On appeal, the California Court of Appeal determined that the pilot was solely the employee of the vessel at the time of the accident and therefore did not decide whether the tariff was declarative of federal law or whether it should apply the tariff as a contract. The California Supreme Court granted certiorari and held the pilot was the dual employee of the City and the vessel based on a finding that the City's tariff pilotage provisions violated the California Tort Claims Act. Thus, it found that state, not federal law, controlled the issue. It also declined to find that the tariff terms were incorporated into an implied contract between the City and SOCIETA.

2. Facts

a. The Accident

On July 3, 1974, the Italian vessel, DA VERRAZANO, allided with Berth 150 in the harbor at Los Angeles

destroying a portion of the City's wharf and certain equipment owned by Union Oil Company. The DA VERRAZANO was under the command of its master, Captain Panizzi, who was assisted by Captain Peterson, a pilot generally in the employ of City and made available to the vessel pursuant to the terms of Item 205 of City's tariff. The shipowner did not contend that the accident was caused by wiliful action of the pilot or gross negligence of the pilot, both of which are the responsibility of the City pursuant to Tariff Item 205(e). Instead, the shipowner contended the accident was caused by improper orders requested by the pilot which were implemented by the master and crew.

b. Request for Pilotage Service

The Los Angeles Harbor Department, a department of the City, manages the Los Angeles harbor. [2/] The City does not itself carry on the business of shipping. Rather, as a landlord, the City provides land and water areas with berths suitable for loading and unloading cargo to vessels in interstate and foreign commerce.

To carry out their operations, vessels need berths, pilots to locate and reach the berths, linesmen to tie up the vessels, and longshoremen to handle the cargo. The vessels rely on local agents located near the harbor to arrange

---

2/ Article XI of the Los Angeles City Charter empowers the Harbor Department to manage the harbor district. The harbor district comprises various lands and waters granted to the City as trustee by the State to be maintained for commerce, navigation and fishing.

these services. On the day of the accident, the pilotage services were requested by the vessel's agent, General Steamship Corporation.

c. Tariff Item 205

Appendix "E," Los Angeles Tariff Item 205, sets forth the terms and conditions under which the City offers pilotage services to vessels calling at the port. The Item provides that pilotage is voluntary [205(a)], that the pilot is to make available his knowledge of local conditions to the vessel [205(b)], and that the vessel owner has the sole duty to navigate the vessel and accepts the pilot as an adviser only [205(c)]. Tariff Item 205(e) specifically provides that the services of the pilot are offered to the vessel on the express understanding that the pilot is the servant of the vessel subject to its command and are offered only upon the condition that, in the event of an accident, the vessel owner agrees to indemnify and defend the City and the pilot for any damages. Item 205(f) provides that the pilotage charges have been computed taking into account the terms upon which the service is offered.

The Court held Item 205(e) violated the California Tort Claims Act. As noted in the lower left hand corner of Item 205, Tariff items are Ordinances of the City. The City contends that Item 205(e) is valid, not because it can as a municipality supersede state law, but because the City's tariff is declarative of the federal admiralty law.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This Court should issue a Writ of Certiorari to the California Supreme Court because that Court applied state law to certain issues and incorrectly applied federal law to other issues thereby destroying needed uniformity in the admiralty law.

I.

THE CALIFORNIA SUPREME COURT BY APPLYING STATE LAW EXCEEDED THE JURISDICTION ALLOWED TO THE STATE UNDER THE SAVING TO SUITORS CLAUSE OF 28 U.S.C. §1333(1) AND DESTROYED THE POSSIBILITY OF A UNIFORM MARITIME LAW.

Pursuant to 28 U.S.C. §1333 district courts have original jurisdiction over all civil maritime matters except that suitors have the right to pursue all other remedies to which they are entitled. Although the law has long recognized that *in personam* suits arising from vessel accidents may be brought in state court, states may not apply their laws when to do so would interfere with the uniformity and characteristic features of the federal maritime law. ***Askew v. American Waterways Operators, Inc.*** (1973) 411 U.S. 325, 338-340. As noted by the California Supreme Court in footnote 10 of its decision, 46 U.S.C. §211, which

delegates to the states the power to regulate pilotage, does not affect this principle since this delegation has traditionally been viewed only as encompassing such matters as licensing fees and the like.

In SOCIETA, the California Supreme Court exceeded the jurisdiction allowed it by the savings to suitors clause by determining liability for vessel accidents under state law. The Court set aside the clear principle which it itself had recognized in its decision of ***Intagliata v. Shipowners and Merchants Towboat Co., Ltd.*** (1945) 26 Cal.2d 365, in which it recognized that federal law governs the consequences of the fault of parties involved in vessel accidents. The effect of the SOCIETA decision is that liability for factually identical pilot-involved accidents will vary from state to state and even within a state depending on whether the case is brought in state or federal court.

II.

THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH THE FEDERAL ADMIRALTY LAW AS SET FORTH IN *UNITED STATES v. SS PRESIDENT VAN BUREN* [(9th Cir. 1973) 490 F.2d 504].

The Southern California harbors of Los Angeles and Long Beach are adjacent. For more than thirty years, these ports, managed by independent charter cities, have published tariffs offering pilotage services. Both Los Angeles and Long Beach in 1955 had compulsory pilotage tariff

provisions requiring vessels calling at the ports to select a city pilot. In 1955 in ***City of Long Beach v. American President Lines***, 223 F.2d 853 (9th Cir. 1955) (***"Van Buren I"***), the Ninth Circuit held that such tariff pilotage provisions created an implied contract between an offering city and a vessel owner requesting such services. However, the Court declared the borrowed servant and indemnity provisions of the 1955 Long Beach Tariff invalid because vessels were forced to use a City pilot.

Following ***Van Buren I***, both Los Angeles and Long Beach eliminated their compulsory pilot tariff provisions. Long Beach's revised tariff was challenged in ***United States v. SS President Van Buren***, 490 F.2d 504 (9th Cir. 1973) (***"Van Buren II"***), in which the Ninth Circuit found that the tariff provisions were voluntary and enforceable. Now, almost 30 years after ***Van Buren I*** and seven years after ***Van Buren II***, the California Supreme Court has stricken the City of Los Angeles Tariff Pilotage provisions as contrary to the policies of the California Tort Claims Act. These provisions were at the time of the DA VERRAZANO accident, practically identical to the Long Beach tariff provision upheld in ***Van Buren II***.

Although the California Supreme Court in parts of its decision cites numerous federal and state cases, its discussion of the enforceability of the tariff as a tariff (*see* Section III of opinion) ignores ***Van Buren II***. Without discussion of the need for uniformity in the maritime law, the Court also fails to address the effect of each coastal state applying its own rules to apportion liability resulting from collisions.

City submits that *Van Buren II* establishes a clear admiralty rule binding the California courts which the savings to suitors clause does not allow a state court to discard.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE CALIFORNIA SUPREME COURT REJECTED THE FEDERAL STANDARD APPLICABLE TO BORROWED SERVANT CASES.

This Court in *Standard Oil Company v. Anderson*, 212 U.S. 215, 219 (1909), and *Denton v. Yazoo & M.V.R. Co.*, 284 U.S. 305 (1931), emphasized that the ability to control an employee at the time of an accident is the determining factor in apportioning liability in borrowed servant cases. The California Surpeme Court rejected this test in favor of a status test. Ignoring the crucial facts recognized by the California Court of Appeal [3/], the Court instead looked at the status of the employee as a general employee of City and did not analyze the actual control over the pilot at the time of the accident.

The correct application of the borrowed servant doctrine to a pilotage case was set forth in *City of Los Angeles v.*

3/ The Court of Appeal decision reported at 114 Cal.App.3d 140, cites testimony demonstrating: (1) The pilot had no authority to command the DA VERRAZANO's crew; (2) all advice of the pilot was accepted or rejected by the master and, if accepted, given by the master to his crew as his orders, and (3) the pilot could be discharged by the vessel master at any time.

Standard Transportation Company, 32 F.2d 988 (9th Cir. 1929), in which the Court stated:

> ". . . In the varied affairs of life it is not always easy to determine where responsibility rests for the act of a servant in the general service of one master but employed in the particular work of another. But the test almost invariably applied is: Whose was the work, and whose the power to control? (United States Supreme Court citations omitted.) While here, the pilot was in the general employ of the City, the work in which he was immediately engaged was the work of the ship or master, and the control to which he was subject was the control of the master. The city was powerless to direct him in the discharge of his duties and was not present to discharge him from the particular service in case of negligence or incompetence. Under such circumstances, we think the cases practically all agree that there was no liability on the part of the city, except perhaps for the employment of a pilot of known incompetence and no such question is presented here."

City respectfully submits these principles apply equally to this case.

CONCLUSION

This Court in *Kossick v. United Fruit Company*, 365 U.S. 765 (1961), ruled that certiorari is properly granted where a case presents novel questions regarding the interplay between state and maritime laws. Over a period of approximately 50 years, the responsibility of cities for pilot-involved accidents has been addressed by the Ninth Circuit Court of Appeals in three major cases. Despite 50 years of litigation, the California Supreme Court demonstrates that the liability for such accident remains in dispute. City respectfully requests that the Court grant its Petition for Certiorari and establish a uniform maritime rule.

DATED: September 13, 1982

Respectfully submitted,

IRA REINER, City Attorney
of Los Angeles

WINSTON F. TYLER, Senior
Assistant City Attorney

RAYMOND P. BENDER,
Assistant City Attorney

Attorneys for Petitioner,
THE CITY OF LOS ANGELES

SOCIETA PER AZIONI DE NAVAGAZIONE ITALIA v. CITY OF LOS ANGELES

31 Cal.3d 446, 183 Cal.Rptr. 51, 645 P.2d 102
[L.A. No. 31387. May 24, 1982.]

Counsel

Lillick, McHose & Charles and Francis J. MacLaughlin for Plaintiff and Appellant.

Burt Pines, City Attorney, James H. Pearson and Jerome Montgomery, Sr., Assistant City Attorneys, and Raymond P. Bender, Deputy City Attorney, for Defendant and Appellant.

Opinion

BIRD, C. J. — This maritime case presents a number of questions. (1) Which appellant must bear the ultimate liability for collision damage proximately caused by the negligence of a municipal harbor pilot? (2) May the City of Los Angeles (City) avoid liability by invoking the "borrowed servant" doctrine? (3) Are the sweeping immunity provisions of the City's port tariff valid and enforceable?

I.

Plaintiff, Societa per Azioni de Navigazione Italia (Shipowner), is the owner of the merchant vessel the *M.V. Da Verrazano*. Defendant City owns and operates the pilot station for Los Angeles Harbor. [1/]

[1/] Pursuant to its charter, the City, through its board of harbor commissioners (Board), is responsible for the management, supervision and control of the Los Angles Harbor. (Los Angeles City Charter (hereinafter L.A.C.C.), art. XI, § 138.) The Board is specifically empowered to acquire and operate all facilities and services which it deems "necessary or convenient for the promotion or accommodation of commerce, navigation or fishery" within the harbor. (*Id.*, § 139, subd. (g).)

Shipowners customarily use a local pilot to guide ships through and within a harbor since these pilots are familiar with prevailing local conditions. The City maintains a staff of local pilots qualified to perform this service in the Port of Los Angeles. The City hires, fires, trains, supervises, and pays these pilots who are civil service employees. On request, the City will furnish one of its pilots to a ship. For this service, the City charges and collects a pilotage fee.

On July 30, 1974, the *M.V. Da Verrazano* arrived at the breakwater to Los Angeles Harbor. Through its local agent, the Shipowner arranged for the Los Angeles pilot station to provide a local pilot to guide the ship to its berth within the harbor. The station assigned Harold Peterson. On boarding the *Da Verrazano*, Peterson went to the bridge and began to give orders regarding the ship's navigation. The master or commander of the ship stood beside Peterson and relayed his orders to appropriate crew members. Peterson gave orders directly to an assisting tug over a walkie-talkie. Apparently, the master of the *Da Verrazano* gave only Peterson's orders to the crew. [2/]

Under Peterson's pilotage, the ship proceeded into the inner harbor. In order to reach its berth, the vessel was required to negotiate a 90-degree turn. Accordingly, Peterson

---

[2/] Several pilots testified at the trial below that it is the custom and practice for a master to defer to the judgment of a pilot concerning navigation within the harbor. Indeed the pilots stated that the large majority of masters are not competent to navigate their vessels within the harbor. However, a master remains in overall command of the vessel and has some limited control over a pilot. A master may advise a pilot and retains the power to countermand a pilot's order.

gave orders intended to accomplish this maneuver. In the midst of the turn, however, the ship struck and damaged a wharf owned by the City and dock facilities owned by Union Oil Company. [3/]

Following the collision, a dispute arose between the parties over who was to bear financial responsibility for the damages. The City disclaimed all responsibility, relying on the pilotage provisions of Los Angeles Port Tariff No. 3 which was adopted pursuant to City ordinance and in effect at the time of the collision. (See L.A. City Ord. No. 138,969; L.A.C.C., § 139, subds. (b), (e), and (h).) [4/]

The pertinent section of Tariff No. 3 reads as follows. [5/] "It is understood and agreed, and is the essence of the contract under which pilotage services are proffered and rendered, and are requested and accepted by the vessel [or] her owners [] that the services of the pilot are requested and accepted on the express understanding that such pilotage services are given, done, or performed solely in the pilot's capacity as the servant of the vessel and of her owners . . . and the owners [] expressly covenant and agree [] not to assert any personal liability against the

---

[3/] Although Union Oil Company participated in this action during its early stages, the company is not a party to this appeal.

[4/] The city charter authorizes the Board to "fix, regulate, and collect rates, tolls and charges" for pilotage services (L.A.C.C., art. XI, § 139, subd. (e)) and to regulate the piloting of all vessels within the harbor (*id.*, § 139, subd. (b)). All such regulations must be approved by the Los Angeles City Council by ordinance. (*Id.*, § 139, subd. (h).)

[5/] Brackets together, in this manner [], are used to indicate deletions from the ordinance. Brackets enclosing material are used to denote insertions or additions by this court. (See *Estate of McDill* (1975) 14 Cal.3d 831, 834 [122 Cal.Rptr. 754, 537 P.2d 874].)

pilot or the City [] arising out of or connected with [] any damage, loss or expenses sustained by the vessel [or] her [] owners [] or by any third parties, even though resulting from [] negligence of the pilot . . . . [S]uch vessel and her owners [] further covenant and agree to indemnify and hold harmless the municipal pilot [and] the City [] in respect to any liability arising out of claims, suits or actions against the municipal pilot [or] the City [] by third parties, resulting from the [] negligence of the municipal pilot . . .. [¶] The vessel and her owners [] further covenant and agree that all damages to municipally owned [] facilities caused, directly or indirectly, by the vessel shall be paid promptly upon demand."

The parties were unable to resolve their dispute over who was to pay for the damages. As a result, in March 1975, the Shipowner filed an action for declaratory relief for the purpose of determining both the validity of the City's tariff and the extent of each party's liability for the damages arising out of the collision. The City answered and in October 1975 filed a cross-complaint which sought a declaration of its rights under the tariff and compensation for the damage to its dock. In its answer, the Shipowner denied liability for the City's damages. The Shipowner also filed a cross-complaint which sought indemnification from the City for any liability assessed against it.

The trial court, on motion for partial summary judgment, applied state law and held the City's tariff invalid under the Tort Claims Act. (See Gov. Code, § 810 et seq.) The case went to trial on the issue of who was liable since the parties had stipulated to the amount of damage done to the City's dock and to Union Oil's facilities.

In September 1979, the trial court found that both the pilot and the ship's crew had been negligent. Seventy-five percent of the responsibility for the collision was assigned to the pilot and twenty-five percent to the ship's crew. The court found that the City alone was liable for the negligence of its pilot-employee, and that the Shipowner alone was liable for the negligence of the crew. The court also denied the Shipowner's claim against the City for indemnification. Subsequently, the Shipowner and the City together paid Union Oil the amount of its damages, [6/] but reserved their rights against each other pending appeal.

Both parties appealed. The City contends that the Shipowner must bear financial responsibility for the negligence of the pilot because the tariff, or the common law "borrowed servant" doctrine so requires. [7/] The Shipowner challenges only the denial of its indemnity claim against the City. [8/]

[6/] The Shipowner paid Union Oil for that portion of its damages which were attributable to the negligence of the ship's crew. The City and the Shipowner each paid a 50 percent share of that portion of Union Oil's damages which were attributable to the negligence of the municipal pilot.

For ease of reference, the damages attributable to the negligence of the municipal pilot will be referred to hereafter as "pilot-caused damages."

[7/] It is undisputed that the Shipowner is solely liable under the doctrine of respondeat superior for the negligence of the ship's crew and thus for 25 percent of the damages incurred by the City.

[8/] This court has jurisdiction over the subject matter of this maritime action (see 46 U.S.C. § 740) pursuant to the provisions of 28 United States Code section 1333. (See generally Gilmore & Black, The Law of Admirality (2d ed. 1975) §§ 1-13, pp. 37-40 [hereafter Gilmore & Black].)

II.

The Primary issue presented by this case is who must bear the ultimate liability for that portion of the collision damages attributable to the negligence of the pilot furnished by the City to the Shipowner. After declaring the City's tariff void and unenforceable, the trial court held the City liable for all pilot-caused damages sustained by Union Oil on a respondeat superior theory. As a result of this ruling, the City must cover its own pilot-caused damages. 9/

(1a) The City contends that the trial court erred in finding it in any degree responsible for the negligence of its municipal pilot. According to the City, whether the question of liability is deteremined by reference to the terms of its port tariff or by reference to otherwise applicable principles of law, it is the Shipowner alone who must pay for the damages caused by the pilot.

In essence, the City's position is that the challenged provisions of its tariff do not alter the liabilities of the parties. If this contention were correct, this court would not have to consider separately the question as to the validity and enforceability of the tariff. **(2)** (See **fn. 10.**) Therefore,

---

9/ The vicarious liability of an employer for the torts of his employees "is designed for the protection of third persons against the risks of the enterprise . . .." (Prosser, Torts (4th ed. 1971) § 72, p. 480.) It does not apply to any action between the employer and his employee. (*Ibid.*) Ordinarily, a pilot would be liable to his employer for his negligence. The California Tort Claims Act, however, severely restricts the ability of a municipality to recover against a negligent employee. (See Gov. Code, §§ 815.2, subd. (a), 825-825.6; Van Alstyne, Cal. Government Tort Liability Practice (Cont.Ed.Bar 1980) § 5.89, pp. 593-597.)

the first issue to be decided is who is vicariously liable for the negligence of the municipal pilot: the City, the Shipowner, or both. [10/]

(3) There is a substantial body of federal maritime law concerning vicarious liability for pilot negligence. Its dominant theme is that in determining who is liable for the negligence of a pilot, courts are to apply the ordinary principles of the law of agency. Due regard is to be given to the peculiarities of maritime life. (See generally Gilmore & Black, *supra*, § 7-16, p. 520; *id.*, § 9-9, p. 598, fn. 24; Griffin on Collision (1949) §§ 187-193, pp. 435-444; cf. *United States v. Webb, Inc.* (1970) 397 U.S. 179 [25 L.Ed.2d 207, 90 S.Ct. 850].)

The federal courts have applied agency principles to determine whether a pilot's negligence can properly be imputed to shipowners (see, e.g., *Homer Ramsdell Co. v. Comp. Gen. Trans.* (1901) 182 U.S. 406 [45 L.Ed. 1155, 21 S.Ct. 831]); to pilots' associations (see, e.g., *Guy v. Donald* (1906) 203 U.S. 399 [51 L.Ed. 245, 27 S.Ct. 63]);

10/ As a general rule, the substantive law to be applied in maritime actions is the general federal maritime law. (*Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205, 215 [61 L.Ed. 1086, 1098, 37 S.Ct. 524]; *Intagliata v. Shipowners & Mer. etc. Co.* (1945) 26 Cal.2d 365, 369-370 [159 P.2d 1].) State law is to be applied only where it does not conflict with an established federal maritime rule or does not otherwise interfere with a needed uniformity in the characteristic features of the federal maritime law. (E.g., *Askew v. American Waterways Operators, Inc.* (1973) 411 U.S. 325, 338-340 [36 L.Ed.2d 280, 289-291, 93 S.Ct. 1590].)

The rule is no different where the action involves the legal consequences of negligent pilotage. While Congress has seen fit to delegate to the states the power to regulate pilotage (see 46 U.S.C. § 211), this regulatory authority has traditionally been viewed as encompassing only matters such as licensing, fees and the like. (See generally Annot., State Regulation of Maritime Pilots Under 46 USCS § 211 (1977) 35 A.L.R.Fed 525.)

and to municipalities or other governmental entities (see, e.g., *Port of Seattle v. M/V Maria Rubicon* (W.D. Wash. 1975) 404 F.Supp. 302).

(4) The law of agency has long recognized that a person generally the servant of one master can become the borrowed servant of another. (E.g., *Denton v. Yazoo & M.V.R. Co.* (1932) 284 U.S. 305 [76 L.Ed. 310, 52 S.Ct. 141]; *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 [162 Cal.Rptr. 320, 606 P.2d 355]; Rest.2d Agency, § 227.) If the borrowed servant commits a tort while carrying out the bidding of the borrower, vicarious liability attaches to the borrower and not to the general master. (E.g., *Denton v. Yazoo & M.V.R. Co., supra*, 284 U.S. at p. 308 [76 L.Ed. at p. 311]; *Marsh v. Tilley Steel Co., supra*, 26 Cal.3d 486.)

(1b) Relying on these principles, the City contends that the sole master to whom liability can attach for the actions of its municipal pilot is the Shipowner, the borrowing master. This is an issue usually reserved for the trier of fact. (*Marsh v. Tilley Steel Co., supra*, 26 Cal.3d at p. 493; Rest.2d Agency, § 227, com. a.) Here, however, the City asserts that undisputed facts establish as a matter of maritime law that its pilotage system is voluntary, and that its pilots become the borrowed servants of shipowners who elect to use its pilotage service.

Whether the City's pilotage system is voluntary or compulsory is significant because if pilotage is compulsory, a shipowner has no in personam liability for the actions of a pilot. The relation of master and servant does not exist between the shipowner and the pilot, and the doctrine of respondeat superior is not applicable. (*Homer Ramsdell*

Co. v. Comp. Gen. Trans., supra, 182 U.S. 406; *The Abangarez* (E.D.La. 1932) 60 F.2d 543, 544; see generally Rest.2d Agency, § 223, com. c; Gilmore & Black, *supra*, § 7-16, pp. 520-521, fn. 135.) The City, admittedly the pilot's general employer, would properly be held solely liable to third parties for his negligence if its pilotage system were compulsory. (E.g., *Paradise v. Shoemaker* (W.D. Wash. 1979) 470 F.Supp. 437, 439 [collecting cases].)

However, Los Angeles Port Tariff No. 3 provides for optional pilotage services to vessels entering, leaving or shifting within the port. [11/] Although a vessel subject to the payment of pilotage fees must pay the City three-fourths of the applicable charge if it elects not to use a municipal pilot, [12/] such a financial "inducement" has long been held not to render compulsory the use of a port's pilots. (E.g., *The Merrimac* (1871) 81 U.S. (14 Wall.) 199, 203 [20 L.Ed. 873, 874]; *United States v. SS President Van Buren* (*Van Buren II*) (9th Cir. 1973) 490 F.2d 504, 506-507.)

Controlling federal precedent thus renders the City's first premise beyond dispute. There is, however, a notable

---

[11/] Item 205, subdivision (a) of Port Tariff No. 3 provides: "The City of Los Angeles, acting by and through its Board of Harbor Commissioners, the governing body of the Port of Los Angeles, maintains a force of municipal pilots duly licensed to perform the service of piloting vessels in, into and out of the Port of Los Angeles. Any vessel entering, leaving, or shifting within the Port of Angeles, by her owners, master, operators, charterers or agents, may, but is not required to, request the services of and be piloted by a municipal pilot. Such pilotage services are understood to be voluntarily requested and voluntarily rendered."

[12/] Port Tariff No. 3, item 215, subdivision (a), exception 1 provides: "Three-fourths (3/4) the entering or leaving charge shall be assessed when [a] vessel subject to the payment of pilotage is not piloted by a municipal pilot."

absence of authority for the second premise — that non-compulsory pilots in the general employ of a municipality become the borrowed servants of the shipowners who elect to use the municipality's pilotage service.

(5) The law is well settled that where a shipowner voluntarily takes on a pilot not in the general employ of another, the shipowner is liable for that pilot's negligence. (E.g., *The China* (1869) 74 U.S. (7 Wall.) 53, 67-68 [19 L.Ed. 67, 72-73].) The federal courts have determined that in such circumstances the shipowner, through the master, has sufficient control or right of control over the pilot's conduct to render the pilot his servant. (*Ibid.*; see generally, Rest.2d Agency, § 220.)

In a land-based occupation, the question would be a close one, given the skill required of harbor pilots, the brief time a pilot is employed by a shipowner, and the comparatively broad authority a pilot has over the navigation of a ship while on board. [13/] (See Rest.2d Agency,

---

13/ "As a profession, pilotage owes its existence to the infinite variety of navigation hazards — currents, tides, sand bars, submerged objects, weather conditions, and the like — that mark the harbors and rivers open to commercial vessels. No matter how competent the master of a ship is at open sea, he cannot be expected to be familiar with the local navigation hazards of each harbor and river that he encounters as he conducts his ship in the course of maritime trade. [Citation.] Accordingly, it has long been the practice of vessels to employ, for each port they enter and leave, a local pilot intimately familiar with the waters of that port to board and guide them through those waters in from or back to the open sea." (*Jackson v. Marine Exploration Co., Inc.* (5th Cir. 1978) 583 F.2d 1336, 1338-1339.)

Further, while on board a pilot is the "temporary master" of a vessel; "temporarily . . . the whole conduct of the navigation of the ship . . ." belongs to him. (*Cooley v. Board of Wardens of Port of Philadelphia et al.* (1851) 53 U.S. (12 How.) 298, 315 [13 L.Ed. 996, 1003]; *Ralli v. Troop* (1895) 157 U.S. 386, 402 [39 L.Ed. 742, 749, 15 S.Ct. 657]; see generally, Griffin on Collision, *supra*, § 190, pp. 439-440.)

§ 220, coms. e, h.) (6) In determining whether a person is an employee or an independent contractor, the most important factor is the right to control the manner and means by which the work is to be performed. "If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established. [Citation.]" (*Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946-947 [88 Cal.Rtpr. 175, 471 P.2d 975].) (1c) Thus, the broad authority over navigation which a pilot has would ordinarily weigh heavily against finding him an employee. [14/]

Nevertheless, the federal courts have concluded that sufficient indicia of a master-servant relationship are present to hold the shipowner the pilot's employer.

First, the occupation is one which is ordinarily considered an incident of the shipowner's business. "The services of the pilot are as much for the benefit of the vessel and cargo as those of the captain and crew . . .." (*The China, supra*, 74 U.S. (7 Wall.) at p. 67 [19 L.Ed. at p. 73]; see generally, Rest.2d Agency, § 220, com. i.) Second,

---

[14/] Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. [Citation.]" (*Tieberg v. Unemployment Ins. App. Bd., supra*, 2 Cal.3d at p. 949.)

the shipowner through the master has the capacity to exercise some limited control over the pilot.

The master controls the "premises" where the pilot's work is done. He remains in overall command of the vessel. (*The Oregon* (1895) 158 U.S. 186, 194 [39 L.Ed. 943, 948, 15 S.Ct. 804]; see generally, Rest.2d Agency, § 220, subd. (2)(a) & com. i.) Moreover, the master has some control over the pilot's actual performance of his task. He may advise the pilot. Further, "[i]t is his duty . . . to interfere . . . in cases of danger which [the pilot] does not foresee, and in all cases of great necessity." (*The China, supra*, 74 U.S. (7 Wall.) at p. 67 [19 L.Ed. at p. 73]; see generally, Rest.2d Agency, § 220, com. d.) The master has the same power to remove the pilot that he has to remove any regular member of the crew. (*The China, supra*, 74 U.S. (7 Wall.) at pp. 67-68 [19 L.Ed. at pp. 72-73].)

Such a limited degree of control might not be sufficient to establish a master-servant relationship in a land-based occupation. However, that is not true under maritime law. "Control is probably the most important factor" in determining whether an employment relationship exists in maritime as well as in common law cases. (*United States v. Webb, Inc., supra*, 397 U.S. at p. 192 [25 L.Ed.2d at p. 215].) However, in the maritime context, any determination must be informed by "necessities of the sea." (*Id.*, at p. 191 [25 L.Ed.2d at p. 215].) One of these necessities is that seamen have greater discretion in the performance of their jobs than is usual in land-based occupations. (*Id.*, at p. 192.) As a result, unless "there is nearly total relinquishment of control through a bareboat, or demise, charter, the [ship]owner may . . . be considered . . . to have sufficient control to be charged . . . an employer." (*Ibid.*)

The facts of this case establish that the Shipowner through the master had a comparable degree of control over the City's pilot. The testimony of both Petersen, the pilot whose negligence caused the collision, and Brady, a former pilot for the City, established the following facts regarding the relation between the City's pilots and shipowners who use their services. The master remains in overall command of the vessel. Although he will ordinarily defer to the expertise of the municipal pilot, the master can advise the pilot regarding the ship's navigation and has the power to countermand the pilot's orders. [15/] Since the pilotage is voluntary, the master obviously has the power to terminate the pilot's service on the vessel at any time.

Given these circumstances, the trial court erred as a matter of law when it found the City to be Petersen's sole employer at the time of the collision for a master-servant relationship existed between the Shipowner and Petersen. (Accord Harb. & Nav. Code, § 820.) Perhaps foreseeing the inevitability of this conclusion, counsel for the Shipowner conceded this point by stipulating, at oral argument, that the Shipowner and the City are jointly and severally liable to Union Oil for the damages it sustained as a result of Petersen's negligence.

However, the conclusion that a master-servant relationship existed between the Shipowner and Petersen does not

---

15/ It is generally accepted that the power to countermand should be used sparingly. "In light of the obvious confusion that would exist on a vessel if, on his slightest whim, the master would countermand the pilot's order, the master . . . ought not to substitute his judgment for that of the pilot except in cases of obvious danger, or where danger is apparent and avoidable." (*Barbey Packing Corporation v. The S.S. Stavros* (D.Ore. 1959) 169 F.Supp. 897, 902 [a case involving pilotage]; see generally, Griffin on Collision, *supra*, § 190, p. 439-440.)

necessarily mean that the respondeat superior nexus between the City and Petersen had ceased to exist. The law of agency recognizes the possibility of dual employment. (7) "Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable [to third parties] for the employee's torts." (*Marsh v. Tilley Steel Co., supra*, 26 Cal.3d at pp. 494-495; see generally, Rest.2d Agency, § 220, subd. (1), § 226, com. a, § 243.) This is especially true where the loaned employee performs work of interest to both the general and special employers. (See Rest.2d Agency, §§ 226, 227, com. b.)

(1d) There is no question that Petersen was performing the business of the City when he undertook to conduct the *Da Verrazano* to its berth within Los Angeles Harbor. The City was engaged in the proprietary function of operating a pilotage service. (See *The Thielbek* (9th Cir. 1917) 241 F. 209; *United States v. Port of Portland* (D.Ore. 1906) 147 F. 865; *General Petroleum Corp. v. Los Angeles* (1937) 22 Cal.App.2d 332 [70 P.2d 998].)

Nor can there be any question that the City had a substantial interest in his work. As the United States Supreme Court has observed: "Pilots are . . . indispensable cogs in the transportation system of every maritime economy. Their work prevents traffic congestion and accidents which would impair navigation in and to the ports. It affects . . . in some measure, the competitive attractiveness of particular ports." (*Kotch v. Pilot Comm'rs* (1947) 330 U.S. 552, 558 [91 L.Ed. 1093, 1097-1098, 67 S.Ct. 910].)

Given these circumstances, there is a presumption that the pilot remained in his general employment. (See Rest.2d Agency, § 227, com. b; ***Dellums v. Powell*** (D.C. Cir. 1977) 566 F.2d 216, 221.) The City can avoid liability only if it can demonstrate that it gave up to the Shipowner "authoritative direction and control" over the pilot. (***The Standard Oil Co. v. Anderson*** (1909) 212 U.S. 215, 222 [53 L.Ed. 480, 484, 29 S.Ct. 252].) "Authoritative direction and control" is more than the power to suggest details or the necessary cooperation. (*Ibid.*; accord ***Kowalski v. Shell Oil Co.*** (1978) 23 Cal.3d 171 [151 Cal.Rptr. 671, 588 P.2d 811].)

The record indicates, however, that the Shipowner did not have "authoritative direction and control" over Petersen. Petersen was under no obligation to obey an order given by the master. (Compare ***Denton v. Yazoo & M.V.R. Co., supra***, 284 U.S. at p. 310 [76 L.Ed. at p. 312].) Both Petersen and Brady testified that they would entertain a master's "orders" but would not follow them if they thought the orders unwise. Instead, they would stop the vessel to discuss the matter. Moreover, the direction of assisting tugs was primarily, if not entirely, Petersen's province, and his judgment was always respected with regard to the number of tugs to be used.

The City, although not "present" at the scene, was not powerless to direct Petersen in the performance of his work. It was the City who trained him. It was the City who determined which jobs he would be assigned. Through its regulations such as the speed limits within the harbor, the City actually exercised control over the manner in which a given pilotage assignment was to be performed. There can

be no question that Petersen was obligated to obey the City's directions. The City retained the power to suspend or terminate his employment. What the record shows, therefore, is that Petersen simultaneously served two employers — the City and the Shipowner. 16/

Since Petersen simultaneously served two employers — the City and the Shipowner — at the time of the collision, under the doctrine of respondeat superior both masters would be jointly and severally liable to third parties for his negligence. (E.G., ***Marsh v. Tilley Steel Co., supra***, 26 Cal.3d at p. 495; cf. ***Edmonds v. Compagnie Generale Transatl.*** (1979) 443 U.S. 256, 260, fn. 7, 271-272, fn. 30

16/ The only maritime case involving similar circumstances to reach a contrary conclusion is ***City of Los Angeles v. Standard Transp. Co.*** (9th Cir. 1929) 32 F.2d 988. The case involved a collision between two ships, the *Lebec* and the *Seekonk*, in the inner Los Angeles Harbor. At the time of the collision, a noncompulsory municipal pilot was navigating the *Seekonk*.

The court found that the accident was proximately caused by the negligence of the master of the *Seekonk*. (*Id.*, at pp. 989-990.) It then went on to observe, *in dictum*, after a very cursory analysis, that the city could not have been held liable for the acts of the pilot in any event, since the pilot was the borrowed servant of the ship. (*Id.*, at p. 990.)

If this dictum ever had persuasive force, it certainly has none today. First, it should be noted that the court was apparently unaware that it had previously rejected this conclusion in another case also involving noncompulsory pilotage. (***The Thielbek, supra***, 241 F. 209, 214.) Moreover, in 1973, the Ninth Circuit tacitly recognized that under the ordinary rules of respondeat superior, a voluntary pilot, while engaged in the navigation of a ship, is the employee not only of the shipowner but also of his municipal employer. (***Van Buren II, supra***, 490 F.2d at p. 507.)

[61 L.Ed.2d 521, 527, 534-535, 99 S.Ct. 2753].) [17/] As regards the City's pilot-caused damages, the pilot's status as the servant of both the City and the Shipowner previously would have barred the City from effectively asserting any liability for these damages against the Shipowner. Traditionally, the negligence of a common employee has been imputed against both his employers in any action between them, thereby effectively barring either employer from collecting damages from the other for any "personal" injury sustained as a result of a common employee's negligence. (See generally, Rest.2d Torts, § 491, com. k.; Rest.2d Agency, § 317; see also *United States v. Nielson* (1955) 349 U.S. 129, 131 [99 L.Ed. 939, 941, 75 S.Ct. 654].) Whether this should be the rule here is open to question in light of the development of comparative fault principles. [18/]

III.

(8) The next issue this court must decide is whether item 205(e) of Los Angeles Port Tariff No. 3 (hereafter, the tariff) is valid and enforceable as a municipal ordinance or regulation. Pursuant to the provisions of the tariff (see

---

[17/] Appellants have not addressed the question of how this liability should be apportioned between themselves. More specifically, neither has discussed whether comparative indemnity principles should be applied to apportion this liability. (See generally, *United States v. Reliable Transfer Co.* (1975) 421 U.S. 397 [44 L.Ed.2d 251, 95 S.Ct. 1708]; *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578 [146 Cal.Rptr. 182, 578 P.2d 899].

[18/] Neither party to this appeal has addressed whether, under comparative fault principles, the Shipowner should bear some liability for the City's pilot-caused damages.

ante, at pp. 452-453), the City seeks to escape all respondeat superior liability for the negligence of its municipal pilots. Failing that, it wishes to secure full indemnification from the shipowners and impose upon them liability for the damages proximately caused by pilot negligence to the City's own facilities.

The Shipowner contends that the tariff/ordinance is void since it purports to regulate the tort liability of the City with regard to its negligent employees. According to the Shipowner, such regulation invades a field preempted by the Legislature through the Tort Claims Act (Gov. Code, § 810 et seq.) [19/] and, therefore, is precluded.

Los Angeles is a chartered city with the power to "make and enforce all ordinances and regulations in respect to municipal affairs, subject only to [the] restrictions and limitations provided in [its] charter[]." (Cal. Const., art. XI, § 5, subd. (a).) As a result, "ordinances relating to matters which are purely 'municipal affairs' are not invalid because they are in conflict with general state laws or because state laws have been enacted to cover the same subject. [Citation.]" (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 539 [86 Cal.Rptr. 673, 469 P.2d 353, 42 A.L.R.2d 1036].)

Quite understandably, the City does not contend that the existence and extent of its liability for the torts of its employees is purely a "municipal affair." It has long been settled that "'the liability of municipalities . . . for the tortious acts or omissions of their servants is a matter of general state concern.'" (*Helbach v. City of Long Beach*

19/ Unless otherwise indicated, all statutory references hereafter are to the Government Code.

(1942) 50 Cal.App.2d 242, 246 [123 P.2d 62]; accord *Eastlick v. City of Los Angeles* (1947) 29 Cal.2d 661, 665 [177 P.2d 558, 170 A.L.R. 225]; *Dept. of Water & Power v. Inyo Chem. Co.* (1940) 16 Cal.2d 744 [108 P.2d 410]; *Douglass v. City of Los Angeles* (1935) 5 Cal.2d 123, 128 [53 P.2d 353]; see generally Sato, "*Municipal Affairs*" *in California* (1972) 60 Cal.L.Rev. 1055, 1092-1093.) Therefore, the City's tariff/ordinance "cannot be given effect to the extent that it conflicts with general laws either directly or by entering a field which general laws are intended to occupy to the exclusion of municipal regulation. [Citations.]" (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 141 [130 Cal.Rptr. 465, 550 P.2d 1001].)

To the extent that the tariff/ordinance purports to exculpate the City from respondeat superior liability for the torts of its pilot-employees, it is in direct confict with general state law. The Tort Claims Act provides that the substantive liabilities and immunities of all independent public entities, including cities (§ 811.2), shall be as provided by *statute*. (§ 815.) As defined by the act, the term "statute" does not include local ordinances or regulations. (§ 811.8.) Thus, the act expressly denies the public entity the power to enact an ordinance abridging its statutory liabilities or expanding its statutory immunities.

Further, the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person (§ 820, subd. (a)) and the public entity is vicariously liable for any injury which its employee causes (§ 815.2,

subd. (a)) to the same extent as a private employer (§ 815, subd. (b)). [20/]

These principles and the rule that a "private" pilot is liable for his own negligence (Griffin On Collision, *supra*, § 188, p. 437), make the City vicariously liable to third parties for injuries proximately caused by the negligence of its pilot-employees to the same extent as a private employer. (See *ante*, at pp. 461-462.) Further, a city may not abridge, much less abolish, this liability *by ordinance*. To the extent that the tariff-as-ordinance purports to exculpate the City from its respondeat superior liability for pilot negligence, it is void.

Similarly, to the extent that the tariff/ordinance purports to preclude shipowners from asserting a cause of action for implied comparative indemnification against the City, it is also void because it is in direct conflict with the general law. (See *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578 [146 Cal.Rptr. 182, 578 P.2d 899]; *United States v. Reliable Transfer Co.* (1975) 421 U.S. 397 [44 L.Ed.2d 251, 95 S.Ct. 1708].) This court has previously recognized that public entities are liable for implied comparative indemnification at least where, as here, a basis for liability is provided in the Tort Claims Act. (See *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 511 [146 Cal.Rptr. 614, 579 P.2d 505] [City held liable for implied comparative indemnity arising out of the dangerous condition of public property].)

It is equally clear that the City may not assert its declared right to full indemnification under the tariff/ordinance as a defense to its liabilities to the Shipowner. Under the Tort Claims Act, "a defense not available to a

---

[20/] There are statutory exceptions but none are relevant here. (See generally, Van Alstyne, Cal. Government Tort Liability Practice (Cont.Ed.Bar 1980).)

private defendant is likewise not available to a public entity defendant absent statutory authority." (Van Alstyne, *supra*, § 2.30, p. 73; see § 815, subd. (b).) Moreover, what the City may not assert defensively, it may not assert affirmatively. That is, the City by ordinance may not enlarge its own right to implied comparative indemnification. To hold otherwise would be to allow the City to nullify to a greater or lesser extent its own liability for implied comparative indemnification. The City may not nullify the statutory right of a shipowner to shift a tort-related loss to the City. (See *Levine v. City of Los Angeles* (1977) 68 Cal.App.3d 481, 487 [137 Cal.Rtpr. 512].)

With this review, it becomes apparent that each and every clause of the City's tariff/ordinance is in direct conflict with the general law. Therefore, the tariff is not valid and enforceable as a municipal ordinance or regulation and the shipowner is not bound by its terms as a matter of law. This result is not surprising. It merely demonstrates the comprehensive nature of the Tort Claims Act. (See *County of Los Angeles v. Superior Court* (1965) 62 Cal.2d 839, 844-845 [44 Cal.Rptr. 796, 402 P.2d 868].)

IV.

(9) In a final effort to garner for itself the protections of its tariff, the City next contends that the tariff provisions were incorporated in its oral contract with the Shipowner for pilotage services. The City quite correctly notes that the Tort Claims Act in no way restricts its authority to alter its liabilities by contract. (§ 814; see *County of San Joaquin v. Stockton Swim Club* (1974) 42 Cal.App.3d 968 [117 Cal.Rptr. 300].) Moreover, under maritime law, federal courts have enforced exculpatory and indemnification

clauses in pilotage contracts in some situations. (E.g. ***Sun Oil Co. v. Dalzell Towing Co.*** (1932) 287 U.S. 291 [77 L.Ed. 311, 53 S.Ct. 135]; ***United States v. S.S. President Van Buren, supra***, 490 F.2d 504.)

That an implied contract arose from the Shipowner's request for pilotage services cannot be disputed. (See ***People v. Randono*** (1973) 32 Cal.App.3d 164, 174 [108 Cal.Rtpr. 326]; ***Tankers and Tramps Corp. v. Tugs Jane McAllister, etc.*** (2d Cir. 1966) 358 F.2d 896.) Having failed to introduce any evidence that the Shipowner had actual notice of the tariff provisions, the City relies primarily on constructive notice theories to establish that the terms of the tariff were intended to be incorporated in this contract.

The City initially contended that the Shipowner was bound by the tariff because it was filed with the Federal Maritime Commission (FMC). Those who use services covered by a tariff are deemed to have constructive knowledge of tariff provisions that are required by law to be, and are in fact, filed with the FMC. (***Port of Tacoma v. S.S. Duval*** (9th Cir. 1966) 364 F.2d 615, 617; ***Pacific S.S. Co. v. Cackette*** (9th Cir. 1925) 8 F.2d 259, 261; cf. ***Waters v. Pacific Telephone Co.*** (1974) 12 Cal.3d 1, 6-7 [114 Cal.Rptr. 753, 523 P.2d 1161]; *id.*, at p. 14 [dis. opn. of Mosk, J.].) Such provisions are binding even if the user of the services lacks actual knowledge of the provisions. (See ***Chadbourn-Caribbean Ind. v. Autoridad, etc.*** (D. Puerto Rico 1977) 428 F.Supp. 493, 495.)

However, the City failed to introduce any evidence that its tariff was filed with FMC. Moreover, the City has now conceded that "[n]othing in the Shipping Act of 1916, 46 U.S.C. § 801 et seq., or in the applicable regulations, 46

C.F.R. § 533.3, requires . . . provisions limiting . . . liability . . ." to be filed with the FMC. (*La Salle Mach. Tool, Inc. v. Maher Terminals, Inc.* (4th Cir. 1979) 611 F.2d 56, 60; see also *Port of Tacoma v. S.S. Duval, supra*, 364 F.2d at p. 617.) Accordingly, this doctrine provides no basis whatsoever for imputing knowledge of the exculpatory and indemnity provisions of the City's tariff to the Shipowner at the time their contract was formed.

The City's reliance on the doctrine that "All applicable laws and ordinances in existence when [an] agreement is made become a part thereof as fully as if incorporated by reference" (1 Witkin, Summary of Cal. Law (8th ed. 1973) § 530, p. 457) is equally unavailing. Its force and effect is wholly vitiated by the invalidity of the tariff-as-ordinance. It would be anomalous indeed for this court to hold the Shipowner bound, under a constructive notice theory, by the terms of a void ordinance.

Finally, the City made a half-hearted attempt to argue that earlier transactions with the Shipowner demonstrated that the contract here impliedly included the tariff's terms. If prior dealings between the City and the Shipowner involving the tariff had been proven, an inference that its terms were incorporated in the contract might well be justified. (See e.g., *Sun Oil Co. v. Dalzell Towing Co.* (2nd Cir. 1932) 55 F.2d 63, 64-65, affd. (1932) 287 U.S. 291 [77 L.Ed. 311, 53 S.Ct. 135]; *Tankers and Tramps Corp. v. Tugs Jane McAllister, etc., supra*, 358 F.2d at p. 899.)

The proof of such prior dealings is lacking here. The City established that the Shipowner had a local agent through whom it had previously arranged to use the City's pilotage services on a number of occasions. However, no evidence

at all was introduced to establish that the provisions of the tariff were ever brought to the Shipowner. (See ***Tankers and Tramps Corp., supra.*** 358 F.2d at p. 899.) In the absence of any evidence from which it reasonably could be inferred that both the City and Shipowner intended that the terms of the tariff be incorporated in their contract, this court cannot say that the trial court erred in finding that the terms were not incorporated therein.

V.

(10) Turning to the Shipowner's appeal, the question is presented as to whether the Shipowner is entitled to recover from the City full indemnity against the liability assessed against it for the negligence of the ship's crew. Purportedly relying on ***Ryan Co. v. Pan-Atlantic Corp.*** (1956) 350 U.S. 124 [100 L.Ed. 133, 76 S.Ct. 232] and its progeny, the Shipowner argues that it is entitled to indemnity because the City breached an implied warranty that the pilotage service would be performed in a workmanlike fashion.

If this court were to assume for purposes of argument that the contract between the City and the Shipowner included an implied warranty of workmanlike performance, the Shipowner could prevail only if it established that the warranty encompassed an obligation to indemnify. (See - ***City of Long Beach v. American President Lines*** (9th Cir. 1955) 223 F.2d 853, 857; ***Barbey Packing Corporation v. The S.S. Stavros, supra,*** 169 F.Supp. at p. 903.) "[T]he factors to be considered in determining whether a contract includes a warranty of workmanlike performance are entirely separate from the factors that go into the determination of whether that warranty encompasses an obligation to indemnify." (***Fairmont Ship. Corp. v. Chevron Internat'l***

Oil Co., Inc. (2nd Cir. 1975) 511 F.2d 1252, 1259, cert. den., 423 U.S. 838 [46 L.Ed.2d 57, 96 S.Ct. 66].) The factors necessary to find an obligation to indemnify is the question addressed by *Ryan Stevedoring* and its progeny.

After a thorough review of the *Ryan* cases, the Second Circuit Court of Appeals found one of the "crucial" factors to be "a contract whereby the contractor agrees to perform services without supervision or control by the shipowner; . . ." (*Fairmont Ship. Corp., supra.* 511 F.2d at p. 1258; accord *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co. Inc.* (1964) 376 U.S. 315 [11 L.Ed.2d 732, 84 S.Ct. 748]; *Stevens v. East-West Towing Co., Inc.* (5th Cir. 1981) 649 F.2d 1104, 1108-1109.) Absent such agreement, no obligation to indemnify may be implied. (*Fairmont Shipping Corp., supra,* 511 F.2d 1252.)

Here, the City did not undertake to perform pilotage services "without supervision or control" by the Shipowner. Therefore, its asserted warranty of workmanlike performance may not be construed to encompass an obligation to indemnify.

VI.

In conclusion, the City's tariff-ordinance cannot be enforced against the Shipowner. As an ordinance, it is void and unenforceable under the Tort Claims Act. Further, the City failed to establish that the terms of the tariff were incorporated in its oral contract with the Shipowner. The trial court was correct in finding that the Shipowner was not bound by the tariff. The trial court was also correct in rejecting the Shipowner's claim for indemnity.

The trial court erred, however, in finding the City solely liable for the pilot-caused damages sustained by Union Oil Company. Under the general principles of the doctrine of respondeat superior the Shipowner and the City are jointly and severally liable for these damages. The judgment of the trial court is, therefore, reversed to this extent.

Since neither party to this appeal has had the opportunity to address whether or how the pilot-caused damages sustained by the City and by Union Oil should be apportioned as between the City and the Shipowner, this issue should be resolved by the trial court. Consequently, this case is remanded to the trial court for further proceedings consistent with the views expressed in this opinion. Each party shall bear its own costs on appeal.

Mosk, J., Newman, J., Kaus, J., and Broussard, J., concurred.

Richardson, J., concurred in the judgment.

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

L.A. No. 31387

SOCIETA per AZIONI de NAVIGAZIONE ITALIA,

Plaintiff and Appellant,

vs.

CITY OF LOS ANGELES,

Defendant and Appellant.

Appeal
County LOS ANGELES
Superior Court No. SOC 38072

The above-entitled cause having been heretofore fully argued, and submitted, it is ordered, adjudged, and decreed by the Court that the case of the Superior Court of the County of Los Angeles in the above-entitled cause, is hereby remanded to the trial court for further proceedings consistent with the views expressed in this opinion. Each party shall bear its own costs on appeal.

I, Laurence P. Gill, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 24th day of May, 1982.

Witness my hand and the seal of the Court, this 24th day of June, 1982.

Laurence P. Gill
Clerk
By R. Nicco
Deputy

Order Due
6-23-82

ORDER DENYING REHEARING

L.A. No. 31387

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

Supreme Court FILED Jun. 23, 1982
Laurence P. Gill, Clerk
J. Rossi
Deputy

SOCIETA PER AZIONI DE NAVIGAZIONE ITALIA

V.

CITY OF LOS ANGELES.

The City of Los Angeles's petition for rehearing DENIED.

/s/Bird
Chief Justice

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, Clause 1. ***Jurisdiction of Courts***

Section 2. The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; . . . .

28 U.S.C.A. Section 1257. ***State courts; appeal; certiorari***

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

28 U.S.C.A. 1333. ***Admiralty, maritime and prize cases***

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C.A. Section 211. ***State regulation of pilots***

Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose. R.S. §4235.

California Harbor Navigation Code, Section 820. ***Liability for negligence of persons employed in navigation; exception***

The master of a vessel is liable to third persons for the acts or negligence of persons employed in its navigation, whether appointed by him or not, to the same extent as the owner of the vessel; but neither the owner nor the master of a vessel is responsible for the negligence of a pilot whom he is bound by law to employ, unless an option is allowed between pilots, some of whom are competent, or unless he is required only to pay compensation to the pilot, but is not required to use his services.

Lillick McHose & Charles
Francis J. MacLaughlin
611 West Sixth St., 28th Floor
Los Angeles, California 90017
(213) 620-9000
Attorneys for Plaintiff and
Cross-Defendant SOCIETA per
AZIONI de NAVIGAZIONE ITALIA,
a corporation

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

SOCIETA per AZIONI de NAVIGAZIONE ITALIA, a corporation,

Plaintiff,

vs.

CITY OF LOS ANGELES, and UNION OIL COMPANY OF CALIFORNIA, a corporation,

Defendants.

CITY OF LOS ANGELES,

Cross-complainant,

vs.

SOCIETA per AZIONI de NAVIGAZIONE ITALIA, a corporation; and DOES ONE through TWENTY,

Cross-defendants.

Filed: April 1, 1976
John J. Corcoran, Acting County Clerk
By L. U. Yogoda, Deputy
NO. SOC 38072

ORDER ON MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Having considered plaintiff's motion for summary adjudication of issues, the memorandum of points & authorities and declaration submitted in support thereof, and opposing papers submitted by defendant City of Los Angeles, and having heard arguments thereon, this Court finds as a matter of law that there is no substantial controversy as to the following matters:

1. Congress has delegated to the States the right to control and regulate pilotage within their borders;

2. Under California Law, pilots are liable for their own negligence, and the employers of pilots are liable for the negligence of their employees;

3. The California Legislature has declared that all municipalities and their employees shall be liable to the same extent as private individuals and the liability of municipalities is a matter of statewide concern;

4. A municipality is without authority to adopt a local ordinance contravening State law or in any way reducing rights given by the State Legislature;

5. Port of Los Angeles Tariff No. 3, §205(e), is inconsistent with the California Tort Claims Act;

6. Said tariff is void under State law, which is controlling.

The contents of this order shall be incorporated into any final judgment subsequently entered in this action. The action shall now proceed to trial in the usual manner for an adjudication as to the liabilities of the parties for the damage alleged and, if pertinent, for a determination of the extent of such damages. The City of Los Angeles, in these further proceedings, may not rely in any way upon the tariff above-mentioned.

DATED: April 1, 1976.

/s/ Hampton Hutton

JUDGE, SUPERIOR COURT

Board of Harbor Commissioners
Port of Los Angeles—Tariff No. 3

Second Revised Page 11
Cancels
First Revised Page 11
and Circular ..... No. 38

SECTION TWO

PILOTAGE

Item No. *200

DEFINITIONS

(a) Pilotage is the charge, calculated in accordance with the pilotage rates named in this Tariff, assessed against a vessel, which is subject to the payment of pilotage under these rules, for the service rendered or proffered of piloting such vessel on entering, leaving, or shifting in the Port of Los Angeles.

(b) Entering is the term applied to vessels inward bound which come within the limits of the Port of Los Angeles from the open sea.

(c) Leaving is the term applied to vessels outward bound which leave the limits of the Port of Los Angeles for the open sea.

*(d) Intra Harbor Movement is the term applied for movement of a vessel between two points both of which are within the limits of the Port of Los Angeles without such vessel leaving or entering those limits.

---

*Change †Addition

†(e) Inter Harbor Movement is the term applied for movement between a point within the limits of Port of Los Angeles and a point within the limits of Port of Long Beach and to movement of a vessel from a point within the limits of the Port of Los Angeles to open sea for the purpose of pumping bilge, pumping ballast, pumping tanks, adjusting compass or to test engines, and return directly to a point within the limits of Port of Los Angeles.

MUNICIPAL PILOTS

Item No. 205

(a) The City of Los Angeles, acting by and through its Board of Harbor Commissioners, the governing body of the Port of Los Angeles, maintains a force of municipal pilots duly licensed to perform the service of piloting vessels in, into and out of the Port of Los Angeles. Any vessel entering, leaving, or shifting within the Port of Los Angeles, by her owners, master, operators, charterers or agents, may, but is not required to, request the services of and be piloted by a municipal pilot. Such pilotage services are understood to be voluntarily requested and voluntarily rendered.

(b) Upon boarding a vessel in response to the request of a vessel, by her owners, master, operators, charterers or agents, for pilotage service in the Port of Los Angeles, it shall be the duty of each municipal pilot to place his local knowledge of San Pedro Bay and its tributaries at the disposal of the vessel's master.

(c) The safe navigation of the vessel, including piloting, is at all times the paramount duty of her master, and the presence of a municipal pilot on the bridge shall in no way relieve the master of his duties. The master remains at all times in full command of the vessel; he shall continue to navigate, and shall take bearings and soundings, check compass courses, check radar, and take all action necessary to safeguard the vessel under his command. In that regard, it shall be the duty of the vessel and her master:

(1) To have posted, and at all times properly instructed, efficient and competent lookouts, each with no other duty to perform, and each with efficient means of rapid communication with the bridge.

(2) To immediately inform the pilot of all reports by lookouts.

(3) On radar-equipped vessels, to have the radar functioning and manned by a competent observer under instructions to keep the master and the pilot constantly and currently informed of observed targets.

(4) To arrange for and provide adequate tug assistance, and to arrange for and have available adequate vessel's lines to assist in tying the tug or tugs.

(5) For the master to remain on the bridge at all times and to accompany the pilot in his duties on and about the bridge.

(6) To provide and supervise competent vessel's personnel.

(7) To understand and agree that, inasmuch as all orders of the pilot shall be given in the presence of the

master, every such order, unless countermanded, shall, for all purposes, be deemed the order of the master and fully concurred in by him, it being further agreed that the pilot is acting in an advisory and not in a command capacity and has no authority independent of the master.

(8) To understand and agree that a pilot is employed only to have the benefit of his local knowledge of San Pedro Bay and its tributaries.

(9) To understand and agree that currents and winds within San Pedro Bay and its tributaries, while normally minimal, are at times wholly unpredictable as to place, extent or force; that because tidal changes are small, bottom suction cannot be predicted by the pilot.

(10) At all times, to have adequate ship's anchors properly manned and ready to drop.

Note to Court: page end of original document included the following information:

Order No. 3867, Adopted May 14, 1969.
Ordinance No. 138,969, Adopted June 26, 1969.
Effective August 9, 1969
Issued by BOARD OF HARBOR COMMISSIONERS
K.R. SADLER, TRAFFIC MANAGER
1412 Occidental Center
Los Angeles, California 90015
Correction No. 190

Note to Court: Text continues on next page:

(11) To provide officers conversant with the English language, or to advise the pilot of any language difficulty

and then request that the pilot give his orders by hand signals through the master.

(d) As every vessel has her own peculiarities in handling, and as the municipal pilot will be aboard for a brief time only and without an opportunity to determine by experience the vessel's peculiarities, it is compulsory upon, and the duty of, the vessel, her owners, master, operators, charterers or agents, to advise the pilot, either before or immediately upon his boarding, of such peculiarities, including but not limited to the following:

(1) Any defects or deficiencies in the vessel, her personnel, engines or tackle;

(2) The vessel's peculiarities concerning steering, stopping, handling, speed and maneuvering, and the propensity of the vessel to sheer;

(3) The number and names of the tugs to be supplied to said vessel; and

(4) Any other information, whether or not herein enumerated, that may or might assist the pilot in the pilotage of the vessel.

(e) It is understood and agreed, and is the essence of the contract under which pilotage services are proffered and rendered, and are requested and accepted by the vessel, her owners, master, operators, charterers or agents, that the services of the pilot are requested and accepted on the express understanding that such pilotage services are given, done, or performed solely in the pilot's capacity as the servant of the vessel and of her owners, master, operators, charterers or agents, and not otherwise, and the owners, master, operators, charterers and agents of the

vessel expressly covenant and agree to comply with the provisions of subitems (c) and (d) of this Item 205 and not to assert any personal liability against the pilot or the City of Los Angeles, the Board of Harbor Commissioners, or any of their officers or employees, to respond in damage (including any rights over) arising out of or connected with, directly or indirectly, any damage, loss or expense sustained by the vessel, her master, owners, charterers, operators, agents or crew, or by any third parties, even though resulting from acts, omissions or negligence of the pilot; and provided, further, that to the extent only to which liability is legally imposed against the vessel, taking into consideration any limitation thereof to which the vessel or its owners, master, operators, charterers or agents are entitled by reason of any contract or bill of lading, or of any statute or rule of law in force, such vessel and her owners, master, operators, charterers and agents further covenant and agree to indemnify and hold harmless the municipal pilot, the City of Los Angeles, the Board of Harbor Commissioners, and each of their officers and employees, in respect to any liability arising out of claims, suits or actions against the municipal pilot, the City of Los Angeles, the Board of Harbor Commissioners, or any of their officers or employees, by third parties, resulting from acts, omissions or negligence of the municipal pilot, excepting, however, such personal liability and rights over as may arise by reason of the wilful misconduct or gross negligence of the pilot.

The vessel and her owners, master, operators, charterers and agents further covenant and agree that all damages to municipally owned or controlled facilities caused, directly

or indirectly, by the vessel shall be paid promptly upon demand.

(f) The pilotage charges assessed for the services proffered or rendered by a municipal pilot under this Tariff have been computed and are assessed in accordance with and based upon each and every of the limitations, agreements, covenants, and conditions set forth in this Item 205. However, said pilotage charges do not include marine insurance insuring the vessel, her owners, master, operators, charterers and agents, from the consequences of negligence of the municipal pilot.

Note to Court: page end of original document included the following information:

See Item 10 for explanation of abbreviations and symbols.

Order No. 3690, Adopted July 19, 1967
Ordinance No. 135,155, Adopted August 23, 1967
Effective May 5, 1969
Issued by BOARD OF HARBOR COMMISSIONERS
E.L. PERRY, EXECUTIVE DIRECTOR
P.O. Box 151
San Pedro, California 90733
Correction No. 177

Office - Supreme Court, U.S.
FILED
OCT 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-470

IN THE

Supreme Court of the United States

October Term, 1982

THE CITY OF LOS ANGELES,

Petitioner,

vs.

SOCIETA PER AZIONI DE NAVIGAZIONE ITALIA, a corporation,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

LILLICK MCHOSE & CHARLES,
FRANCIS J. MACLAUGHLIN,
707 Wilshire Boulevard,
44th Floor,
Los Angeles, Calif. 90017,
(213) 620-9000,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

Page

I.

The California Supreme Court Did Not Apply State Law so as to Destroy Uniformity of General Maritime Law 1

II.

This Decision Is Not in Conflict With United States v. S.S. President Van Buren, (9th Cir. 1973) 490 F.2d 504 4

III.

This Decision Is Not Inconsistent With Any Maritime Rule Applicable to Borrowed Servants 4

Conclusion 5

TABLE OF AUTHORITIES

Cases	Page
Askew v. American Waterways Operators, Inc., 411 U.S. 325, 338-340 (1973)	2
City of Safe Harbor v. Ritchfield, 529 F.2d 1251, 1254 (5th Cir. 1976)	3
Intagliata v. Shipowners & Mer., Etc., Co., 26 Cal.2d 365, 369-370 (1945)	2
Knouse v. Nimocks, 8 Cal.2d 482, 483-4, 66 P.2d 438 (1937)	5
Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917)	2
United States v. S.S. President Van Buren, 490 F.2d 504 (9th Cir. 1973)	4, 5
Statute	
46 U.S.C. §211	2
Rule	
Supreme Court Rules, Rule 17	5
Textbook	
Annot., State Regulation of Maritime Pilots Under 46 U.S.C. Sec. 211 (1977), 35 A.L.R. Fed. 525	2

No. 82-470

IN THE

Supreme Court of the United States

October Term, 1982

THE CITY OF LOS ANGELES,

Petitioner,

vs.

SOCIETA PER AZIONI DE NAVIGAZIONE ITALIA, a corporation,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

I.

The California Supreme Court Did Not Apply State Law so as to Destroy Uniformity of General Maritime Law.

The City's first argument in support of its petition is that the California Supreme Court ". . . exceeded the jurisdiction allowed it by the savings to suitors clause by determining liability for vessel accidents under state law." [p. 8, Petition]

Even a slight perusal of the California Supreme Court's opinion reveals the inaccuracy of the City's assertion. In Part II of the opinion, the Court discussed the respective liabilities of the shipowner and the City for pilot negligence and held, specifically, that the substantive law to be applied

is the general maritime law and not state law. As the Court declared in footnote 10:

> "As a general rule, the substantive law to be applied in maritime actions is the general federal maritime law. [*Southern Pacific Co. v. Jensen*, (1917) 244 U.S. 205, 215; *Intagliata v. Shipowners & Mer., Etc., Co.*, (1945) 26 Cal.2d 365, 369-370]. State law is to be applied only where it does not conflict with an established federal maritime rule or does not otherwise interfere with a needed uniformity in the characteristic feature of the federal maritime law (E.g., *Askew v. American Waterways Operators, Inc.* (1973) 411 U.S. 325, 338-340.)
>
> The rule is no different where the action involves the legal consequences of negligent pilotage. While Congress has seen fit to delegate to the states the power to regulate pilotage (see 46 U.S.C. §211), this regulatory authority has traditionally been viewed as encompassing only matters such as licensing, fees and the like. (See generally Annot., State Regulation of Maritime Pilots Under 46 U.S.C. §211 (1977) 35 A.L.R. Fed. 525.)"

The Court then discussed the liability issue in great depth, relying upon numerous decisions of this Court and of federal courts of appeal in support of its conclusion that the pilot was a joint servant of the shipowner and the City. The California Supreme Court decision on this point, based as it was upon the general maritime law, does not in any respect destroy uniformity of the maritime law but actually reinforces it.

In Part III of its opinion, the California Supreme Court considered the further issue of whether the result dictated by the general maritime law, described above, would be altered by reason of the municipal ordinance by which the City purported to exculpate itself from liability for the neg-

ligence of its pilot-employee. As the Court noted, the City of Los Angeles is a chartered city established by the California Legislature and has only those powers given to it by the Legislature, which powers are specifically limited to making and enforcing ordinances and regulations in respect to "municipal" affairs. The City conceded, as it was required to do, that the liability of a municipality, such as itself, is not a "municipal" affair but instead is a matter of "general state concern" over which the State Legislature alone has jurisdiction. Since the State Legislature has enacted the California Tort Claims Act which provides that a public entity is liable for the negligence of its employees to the same extent as a private employer, the liability of the City was fixed by that statute and the City's ordinance, which was patently inconsistent therewith, was void.

In determining the City's authority to adopt this ordinance, the California Supreme Court properly looked to the state law which created the City and from which the City draws whatever powers it possesses. It is well-settled that a federal court, when examining the powers of a municipality to adopt an ordinance, must do exactly the same thing, *i.e.*, look to the state law which created the municipality. See *City of Safe Harbor v. Ritchfield*, (5th Cir. 1976) 529 F.2d 1251, 1254.

In Part IV of its opinion, the California Supreme Court reviewed the evidence relating to the City's claim that it had an oral contract with the shipowner which incorporated the exculpatory language of the void ordinance. In finding there was no evidence of record to support such a contract, the Court reviewed numerous federal and state decisions and found that under no legal theory, or governing body of law, was there any evidence to support the City's contract contention.

In summary, the California Supreme Court relied upon federal maritime law to determine the liability of the shipowner and the City for pilot negligence and to determine the terms of the pilotage contract. The Court looked to California law only to determine the authority of the City to adopt the exculpatory ordinance and this is exactly what federal courts do in the same circumstances. Accordingly, the City's assertion that the California Supreme Court applied the wrong law, and thereby destroyed uniformity of maritime law, is patently and totally without merit.

II.

This Decision Is Not in Conflict With *United States v. S.S. President Van Buren*, (9th Cir. 1973) 490 F.2d 504.

In support of its petition the City next argued this decision is in conflict with *United States v. S.S. President Van Buren*, (9th Cir. 1973) 490 F.2d 504, known as *Van Buren II*. The City misreads both opinions.

In *Van Buren II*, the Ninth Circuit rules without much discussion on this point that a Long Beach tariff which contained an option trip insurance provision, which the Los Angeles tariff lacks, was enforceable. The Ninth Circuit did not even discuss or rule upon the threshold question of whether the municipality had the authority in the first instance to adopt such an ordinance. The two opinions are not in conflict — the California Supreme Court simply decided its case on grounds which were not discussed or ruled upon by the Ninth Circuit.

III.

This Decision Is Not Inconsistent With Any Maritime Rule Applicable to Borrowed Servants.

The City's last argument in support of its petition is that the California Supreme Court in deciding that the pilot was a joint servant of the shipowner and the City relied upon

a "status" test rather than upon an "ability to control" test. The City's statement is flagrantly erroneous, since the California Supreme Court specifically declared, in reliance upon a ruling of this Court, that control is probably the singlemost important factor in determining whether an employment relationship exists. (31 Cal.3d 459). The California Supreme Court then reviewed in great depth the evidence pertaining to ability to control and decided the issue on that basis. The City's present reference to a status test is not only patently erroneous but is incomprehensible.

In support of this argument, the City cites the opinion of the California Court of Appeals, but the City well-knows, or should know, that any reference at this time to such a citation is completely improper. In California, the granting of a hearing by the California Supreme Court had the effect of vacating the Court of Appeals' decision. Although that decision was printed in the Advance Sheets before it was vacated, the opinion will not appear in the permanent case reports and is considered a complete nullity which cannot be cited or relied upon for any purpose. See *Knouse v. Nimocks*, (1937) 8 Cal.2d 482, 483-4, 66 P.2d 438.

Conclusion.

It is clear that the City had failed to establish any basis for the issuance of a writ of certiorari within the scope of Supreme Court Rule 17. The City has not demonstrated that the California Supreme Court decided a question of federal law which is in any way in conflict with the decision of another state court of last resort nor of a federal court of

appeals. This appears to have been the only ground relied upon by the City and there is nothing to support it.

Respectfully submitted,

LILLICK MCHOSE & CHARLES,
FRANCIS J. MACLAUGHLIN,
Attorneys for Respondent
Societa Per Azioni De
Navigazione Italia.